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COURT OF CRIMINAL APPEALS
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IN THE

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COURT OF CRIMINAL APPEALS
3/3/2021
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COURT OF CRIMINAL APPEALS

OF TEXAS

ROY OLIVER,
APPELLANT
V.
THE STATE OF TEXAS,
APPELLEE

APPELLANT'S BRIEF ON THE MERITS
ON REVIEW FROM THE FIFTH COURT OF APPEALS
AT DALLAS, CAUSE NUMBER 05-18-01057-CR

On appeal from Cause Number F17-18595-V
in the 292nd Judicial District of Dallas County, Texas
Honorable Brandon Birmingham, Judge Presiding

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IDENTITY OF JUDGE, PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 68.4(a), the following is a complete list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel:

1. The parties to the trial court's judgment are the State of Texas and Roy Oliver, Appellant.

2. Jim Lane, attorney of record for Appellant at trial, 204 W. Central, Fort Worth, Texas 76164.

3. D. Miles Brissette, attorney of record for Appellant at trial, 2502 Gravel Drive, Fort Worth, Texas 76118.

4. Robert K. Gill, attorney of record for Appellant at trial and on appeal, 2502 Gravel Drive, Fort Worth, Texas 76118.

5. Faith Johnson, District Attorneys of Dallas County, attorney for the State of Texas, her assistants at trial Michael R. Snipes, Jason Hermus, Andrew Chatham, George Lewis, Shawnkeedra Houston-Martin, Brian Higginbotham, and Shelly Yeatts.

6. John Creuzot, District Attorney of Dallas County, attorney for the State of Texas and his assistant on appeal, Douglas R. Gladden.

7. Hon. Brandon Birmingham, judge presiding at trial.

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APPELLANT'S BRIEF ON THE MERITS

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES, Appellant in this cause, by and through his attorney of record, ROBERT K. GILL, and would show the Court as follows:

STATEMENT OF THE CASE

Appellant, a police officer, was indicted for the murder of Jordan Edwards. CR 29. Appellant was on duty at the time. Appellant was also charged with aggravated assault of Vidal Allen and Maximus Everette. RR 19 – 32. He pled not guilty. RR 19 – 30-33. Appellant testified in his behalf at trial, saying that he was acting in defense of his partner. *See* RR 24 – 59 – 177. The jury was charged on defense of a third person. *See* CR2: 376-79.

A Dallas County jury convicted Appellant of murder, but acquitted Appellant of both aggravated assault charges. RR 27 – 19-21. After hearing punishment evidence, that same jury assessed a sentence of fifteen years in prison. RR 28 – 198. Appellant filed a notice of appeal. CR1: 967.

Appellant raised thirteen points of error. A panel of the Dallas Court of Appeals rejected Appellant's points in an unpublished opinion. *See Oliver v. State*, No. 05-18-01057-CR (Tex. App.—Dallas Aug. 10, 2020) (mem. op., unpublished). Appellant filed a petition for review in this Court. The petition was granted on the issue of whether the Dallas Court of Appeals employed the proper standard of review regarding Appellant's Fifth Amendment claims.

ISSUE PRESENTED

The Dallas Court of Appeals improperly shifted the burden to Appellant to prove prosecutorial use of his immunized *Garrity* statements. Precedent from the U.S. Supreme Court and the federal circuit courts is clear that the prosecution bears a heavy burden to demonstrate that immunized statements by the defendant played no part in the investigation or prosecution of a criminal offense.

STATEMENT OF FACTS

Appellant was a Balch Springs Police Officer. He fired into a car killing Jordan Edwards. Appellant testified that he thought the car was about to run over his partner. A Dallas County jury disagreed with his defensive claims and convicted Appellant of murder. As the issue before this Court concerns Appellant's *Garrity* statements, a more detailed examination of the facts surrounding those statements follows.

Lieutenant Mark Maret is employed with the Balch Springs Police Department. RR 19 – 297. One of his jobs with the department is managing internal affairs. RR 19 – 297. When a complaint against an officer is made, it comes to internal affairs for Maret to investigate it. RR 19 – 298. Before an officer involved in a complaint gives a statement, he is given a *Garrity* warning. RR 19 – 299.

A little after three in the morning on April 30, 2017 (a couple of hours after the incident), Lt. Maret met with Appellant. RR 19 – 302. After exchanging pleasantries, Maret gave Appellant the initial complaint letter, his constitutional protection warning (the *Garrity* warning), and the investigation warning. RR 19 – 303. Appellant signed the constitutional protection warning. RR 19 – 303. Appellant then, accompanied by his police-union-provided attorney, went into the Balch Springs Department headquarters to watch body cam videos of the incident. RR 19 – 304. After that, Appellant's attorney handed Lt. Maret a written statement from

Appellant. RR 19 – 304. That statement was placed in an internal affairs file. RR 19 – 305. The statement was shown to Lieutenant Hurley, and probably to Chief Haber of Balch Springs. RR 19 – 312. Indeed, Chief Haber had ordered the internal affairs investigation. RR 19 – 323. Hurley and Haber had access to the statement made by Appellant. RR 19 – 332.

On May 2, Lt. Maret called Appellant and asked him to participate in a follow-up interview at Seagoville Police Department. RR 19 – 314. Appellant's attorney called Maret and expressed concern that she would not be able to be there. RR 19 – 314. Maret's response was that he had never had an attorney sit in on an interview like that. RR 19 – 315. Appellant signed another *Garrity* warning. RR 19 – 315. This interview was audio-recorded. RR 19 – 316.

The file itself – including Appellant's statements, audio recordings, and the warnings – were placed in a locked filing cabinet at the Balch Springs Police Department. RR 19 – 332. However, the lead prosecutor in Appellant's trial requested Lt. Maret to deliver the entire internal affairs file to a person named Rendon, an investigator at the Dallas District Attorney's Office. RR 19 – 333-34. This delivery occurred in early June 2017. RR 19 – 334. Investigator Rendon did not testify. According to D.A. office policy, a D.A. employee must "review [the internal affairs file] and extract from it any potential *Garrity* information." RR 20 – 66. Jason Hermus, the head of the District Attorney's Public Integrity Division, testified that

during trial he asked Investigator Rendon if she had the file, and if she would personally deliver it to the judge. RR 20 – 69. An indictment for this offense was not returned against Appellant until July 17, 2017. CR 1 – 29.

At issue in the trial court was whether these two statements (and a third statement by Appellant, which was the product of a "walk-through" with Dallas County Sheriff's deputies) were immunized statements the use of which would violate Appellant's Fifth Amendment rights. The trial court denied all of Appellant's requested relief.

The Dallas Court of Appeals affirmed, holding that (1) the "walk-through" statement was a voluntary statement that was not subject to exclusion; and (2) that Appellant failed to sustain his burden to prove that the other two "immunized" statements were used against him either during grand jury proceedings or during his trial. *See Oliver*, slip op. at 10-14.

ARGUMENT AND AUTHORITIES

The issue in this appeal is the extent to which the State has any burden to demonstrate that it has not – in any way – "used" statements by a defendant that are undoubtedly entitled to Fifth Amendment immunity. Appellant was a police officer who was ordered to provide a statement to a superior officer in his department. Failure to do so, Appellant was warned, would result in his termination from the department. *See* Def. ex. 1. Appellant subsequently gave a written statement, participated in a "walk-through" with Lt. Maret and members of the Dallas County Sheriff's Department, and then gave an interview to internal affairs which was recorded. RR 19 – 303-05, 315-16, 329.

1. Appellant's statements and *Garrity.*

While an officer cannot remain silent in disciplinary proceedings, he does not lose his Fifth Amendment privilege in criminal proceedings. *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70 (1973). An officer's statements, "obtained under threat of removal from office" cannot be used against him in a subsequent criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). The Dallas Court held that Appellant's two statements to Lieutenant Maret of the internal affairs division of the Balch Springs Police Department were entitled to immunity under *Garrity*. *See Oliver*, slip op. at 10.

The effect of *Garrity* is to confer use and derivative use immunity on the employee for his statement at any later criminal proceeding. *Kastigar v. United States*, 406 U.S. 441 (1972). This protection has been described as "self-executing immunity." *See United States v. Veal*, 153 F.3d 1233, 1239 n. 4, 1241 n. 7 (11th Cir.1998) (the Fifth Amendment protection afforded by *Garrity* is self-executing and tantamount to use immunity); *see also Chan v. Wodnicki*, 123 F.3d 1005, 1009 (7th Cir.1997) (citing *Garrity* for the proposition that "the threat of job loss for a public employee is a sufficient threat to require that the employee be granted immunity from prosecution"); *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982) ("An employee who is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution.").

At trial, Appellant made various claims concerning these statements, alleging in the main that the State was unable to demonstrate that the *Garrity* statements had not been used against him. The trial court denied Appellant's claims.

On appeal, Appellant repeated these claims, but the Dallas Court of Appeals rejected them, holding that *Appellant* had a burden to demonstrate the statements' use by the District Attorney's Office: "Appellant did not carry his burden to offer a foundation for his contention that his *Garrity* immunity was violated either by

witness testimony at the grand jury or at trial or by the presence of his statements in the District Attorney's file." *Oliver*, slip op. at 14.

It was this holding which this Court must now review.

2. *Kastigar* and the required burden of proof.

Kastigar prohibits the use and derivative use of any compelled testimony (such as Appellant's) by a suspect.[1] *Kastigar*, 406 U.S. at 453. What this means is that a witness is protected against "'the use of his testimony to search out other testimony to be used in evidence against him,'" as well as against the prosecution's gaining from the testimony "'a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness.'" *Kastigar*, 406 U.S. at 454 (*quoting Counselman v. Hitchcock*, 142 U.S. 547, 564, 586 (1892)). Once a compelled, incriminating, testimonial statement has been obtained, the state bears the burden of demonstrating that the evidence it wishes to use is "derived from a legitimate source wholly independent of the compelled testimony." *Id.*, 406 U.S. at 460. This burden of proof is not met by simply negating or denying taint. *Id*. The

[1] *Kastigar* involved a specific statute immunizing compelled testimony given under oath to a federal grand jury. *See Kastigar*, 406 U.S. at 442; 18 U.S.C. § 6002. But whether an immunity statute exists in a *Garrity* situation is immaterial. The Supreme Court itself describes *Garrity* statements as immunized. *See Lefkowitz*, 414 U.S. at 82. *See also* Stephen D. Clymer, Compelled Statements From Police Officers and Garrity Immunity, 76 N.Y.U. L.REV. 1309, 1318, n.32, 33 (2001) (lower courts have described "*Garrity* as a case involving a privilege and compelled statements as 'immunized.' ").

state bears the burden of proof by a preponderance of the evidence. *United States v. Nanni*, 59 F.3d 1425, 1431-32 (2d Cir. 1995); *United States v. Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994). It is insufficient to meet the state's burden by merely denying that an immunized statement was used, even if that denial is made in good faith. *Nanni*, 59 F.3d at 1432; *United States v. Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985). Rather, the government must "document[] or account[] for" "[e]ach step of the investigative chain" by which the evidence was obtained from a legitimate source wholly independent of the compelled statement. *Hampton*, 775 F.2d at 1490.

3. The Dallas Court's mistaken analysis.

The Dallas Court of Appeals appeared concerned with what quantum of proof was required to show that the witnesses at Appellant's trial or grand jury proceedings knew of or had even heard of his *Garrity* statements. *See Oliver*, slip op. at 12. How the witnesses testified in front of both the grand jury and trial court jury, of course, are two important components of a *Kastigar* review. For example, a prohibited "use" of an immunized statement occurs if a witness's recollection is refreshed by exposure to the statement or if his testimony is in any way "shaped, altered, or affected" by such exposure. *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir. 1992) (*quoting United States v. North*, 943 F.2d 851, 860-61 (1990)). According to the Dallas court, a defendant bears the burden to "lay a firm foundation that the

State's evidence was tainted by exposure to those immunized statement[s]." *Oliver*, slip op. at 11-12 (*relying on Slough v. United States*, 641 F.3d 544, 551 (D.C. Cir. 2011)).

This analysis is flawed – or at least incomplete. The cases relied on by the Dallas Court dealt only with the issue of whether it could be shown that a *grand juror* had been exposed to the immunized testimony. For example, in *Lawn v. United States*, 355 U.S. 339 (1958), the Supreme Court held that a defendant must do more than just suspect that the grand jury in his case had used immunized material that had been produced to an earlier grand jury. *Id*. at 350. In *Slough* the issue was similarly whether any of the grand jurors had been exposed to immunized testimony. *Slough*, 641 F.3d at 549. The D.C. Circuit court held that there was not enough of a foundation laid by the defendant that the evidence was tainted. *Id*. at 551.

But is this the standard that should be used when discussing how the *prosecuting authority* may have used the immunized testimony? That was one of the issues in Appellant's case. The lead prosecutor in the case had Lieutenant Maret deliver the *Garrity* statements directly to an investigator for the Dallas County District Attorney's Office. RR 19 – 334. The D.A.'s office apparently has a policy that an employee of the office must review internal affairs files and extract from them any "potential *Garrity* information." RR 20 – 66. However, in this particular situation, evidence of what happened to the *Garrity* statements and what the D.A.'s

office did with them is entirely lacking – the investigator who took hold of the statements, Investigator Rendon, never testified. Jason Hermus, the head of the District Attorney's Public Integrity Division, testified that during trial he asked Investigator Rendon if she had the file, and if she would personally deliver it to the judge. RR 20 – 69.

All of this illustrates the problem with the Dallas Court's burden-shifting: all the State could do was, at most, deny that members of the trial team did not use the statements. The State did not and could not show that Investigator Rendon had nothing to do with the case, that her examination of the *Garrity* statements did not lead to the discovery of new evidence, or that some other employee of the office had examined the file and found Appellant's statements to be useful, or whether the contents of the statements were in some way "used" by Rendon or other D.A. employees who simply may not have understood that the statements were protected. The State was in a much better position than Appellant to have had access to this information – Appellant could in no way have tracked the journey of his statements once they left Balch Springs for the labyrinth of the District Attorney's office. Accordingly, it makes sense, as the applicable cases illustrate, to have the government shoulder the burden of showing that it did not use the immunized *Garrity* statements in any way.

The cases – ignored by the Dallas Court – make this clear. Quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964), the *Kastigar* Court asserted "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy*, 378 U.S. at 79 n.18. *Kastigar's* rule, to be constitutionally sufficient, "must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). Indeed, the burden to prove that all of its evidence was derived from sources independent of the immunized testimony extends to the point that the State must demonstrate that no nonevidentiary or strategic use was made of the immunized testimony or the fruits of the testimony. *North*, 943 F.2d 863.

In other words, the Dallas Court relied on a factually distinguishable line of cases (actually, just a pair) – the grand jury witness cases *Lawn* and *Slough* – to justify its view that a defendant bears the burden to prove something that he could never know: namely, to what extent did the prosecution "use" the immunized statements.

A helpful case in this regard is the decision of the District of Columbia Court of Appeals in *Aiken v. United States*, 30 A.3d 127 (D.C. 2011). In that case, the

defendant was accused of threatening, harassing, and assaulting his girlfriend. *Id.* at 131. Before the criminal trial, the girlfriend petitioned for a civil protection order. *Id.* at 130. A hearing was held during which both the girlfriend and the defendant testified. *Id.* at 131. By statute, the defendant's testimony at the hearing was immunized. *Id.* at 132. In attendance at the hearing was the lead investigator on the criminal case against the defendant. *Id.* at 134. After the defendant was convicted, his case was reversed based on ineffective assistance of counsel and a *Kastigar* hearing was held. *Id*. at 130. During that hearing, the investigator claimed that nothing that happened at the protection order hearing affected her investigation or the prosecution of Aiken. *Id.* The trial court believed the investigator's testimony, and the court of appeals did not disturb that finding. *Id.* at 135. According to the court of appeals, however, the issue was not the investigator's sincerity. *Id.* The issue was whether the government had carried its burden of proof showing that no use was made of the immunized testimony. *Id.* The government could not meet this burden because all it had was the investigator's denials and no other corroborative evidence. *Id. See also United States v. Seiffert*, 463 F.2d 1089, 1092 (5th Cir. 1972) ("The prosecutor, the FBI agent who investigated the case, and the FDIC attorney all testified that they did not make direct nor indirect use of Seiffert's testimony. These conclusory statements are simply not enough to carry the burden.").

Similarly, in Appellant's case, any evidence of lack of taint is absent. Rendon did not testify at all. There is nothing to indicate whether she took part in any investigation (whether or not her participation was known to the trial team) or whether she passed on any information or strategy related to Appellant's statement to any other investigator concerned with Appellant's case. One of the prosecutors testified that he did not use the *Garrity* statements. But that is simply not enough for the State to justify its burden under the Fifth Amendment. *See United States v. Tantalo*, 680 F.2d 903, 908 (2d Cir. 1982) (stating, "the heavy burden cast upon the Government. . . is not satisfied by the prosecution's assertion that immunized testimony was not used" and that "[s]uch disclaimer provides an inadequate basis for the denial of a motion to dismiss an indictment."). Thus, even if Rendon had testified that she did not make use of Appellant's statements, that would be insufficient under the correct standard of review to justify a finding that there was no taint.

The Dallas Court of Appeals improperly shifted the burden from the State to Appellant to prove the existence of a Fifth Amendment violation. The State was in a much better position to present evidence that it did not use Appellant's immunized statements in its investigation and prosecution of Appellant. Instead of requiring the State to demonstrate its non-reliance on Appellant's statements, the Dallas Court (and the trial court below) ignored relevant legal authority and found that Appellant had a burden to prove otherwise.

CONCLUSION AND PRAYER

Appellant made statements to pursuant to a *Garrity* warning that he reasonably thought were compelled. Based on the precedent, the burden of proof is on the State of Texas to prove that there was no use made of those statements. This Court should so find.

PRAYER FOR RELIEF

Appellant prays that this Court reverse the judgment of the Dallas Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert K. Gill, attorney for Appellant, do hereby certify that a true and correct copy of the above and foregoing Appellant's Brief on the Merits has been e-served to the State Prosecuting Attorney at information@spa.texas.gov and to Hon. Douglas Gladden, Dallas County Assistant District Attorney, at douglas.gladden@dallascounty.org, on this the 1st day of March 2021, and an efiled-stamped copy will be deposited in first class U.S. mail addressed to Appellant Roy Oliver, TDCJ #02216845, Ramsey Unit, 1100 FM 655, Rosharon, TX 77583.

/s/Robert K. Gill
Robert K. Gill

CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Tex. R. App. P. 9.4(i)(2)(B), the foregoing document contains 2,958 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(2)(B). Signed on this the 1st day of March 2021.

/s/Robert K. Gill
Robert K. Gill

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